

AMENDMENT NO. 4

TO CONCESSION SERVICES CONTRACT Lopez Lake Recreation Area

This Amendment No. 4 is to that Novation Contract for Concession Services ("Contract") dated June 4, 1996 and amended June 5, 2001, April 7, 2009, and August 18, 2009, entered into by and between the San Luis Obispo County Flood Control and Water Conservation District ("District") and CPS Amusements, Inc., a California Corporation and Christopher P. Simpson, an individual doing business as Mustang Water Slides ("Concessionaire").

WHEREAS, Concessionaire operates a water slide facility at the Lopez Lake Recreation Area ("Premises"); and

WHEREAS, Concessionaire and District agree that the current rental rate does not provide sufficient net income for the Concessionaire to improve the water slide facility and to improve marketing strategies to promote it; and

WHEREAS, the Contract currently terminates on January 23, 2018; and

WHEREAS, an extension of the termination date of the Contract will improve the likelihood that Concessionaire will be able to obtain business and capital improvement loans from commercial lenders; and

WHEREAS, it is in the best interest of the Concessionaire, District and the public to amend the terms of this Contract;

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and conditions herein set forth, District and Concessionaire mutually covenant and agree as follows:

1. Paragraph 5. Extension of Term. The following sentence is inserted after the first sentence of this paragraph:
"The Concessionaire may extend this contract for a third successive and consecutive separate term of approximately five years from January 23, 2018 to December 31, 2022."
2. Paragraph 7a. Rental. The following language is deleted:
"10% of the first \$100,000 of annual gross receipts
12% of all over \$100,000 of annual gross receipts"

and replaced with the following:

“5% of annual gross receipts for calendar year 2013, retroactively to January 1, 2013.

6% of annual gross receipts for calendar year 2014.

7% of annual gross receipts for calendar year 2015.

8% of annual gross receipts for calendar year 2016 and thereafter.”

3. Paragraph 7b. Rental is deleted in its entirety.
4. Paragraph 8 (m). Use of Premises. The following paragraph is added at the end of the paragraph:

“Concessionaire shall comply with any County of San Luis Obispo smoking ordinance, including that which may apply to County-owned lands and parks, and may request approval of a designated smoking area by the County Public Health Director, if permitted by law.”

5. Paragraph 15. Maintenance and Use of Improvements. The following language is added at the end of the paragraph:

“Concessionaire shall adhere to the requirements of the permit issued to the County of San Luis Obispo by the Regional Water Quality Control Board (RWQCB) that governs stormwater and non-stormwater discharges, and which is in effect during the term of this Lease. District will provide Concessionaire with a copy of the permit, upon request. Activities performed on the Premises shall conform to the permit, and Concessionaire shall adhere to Best Management Practices (BMPs) required by the RWQCB. Concessionaire shall allow County to inspect the Premises to verify compliance with BMPs and will cooperate with County to fulfill the reporting requirements of the RWQCB.”

6. Paragraph 16. Utilities and Services, the following language is added to the end of the first subparagraph:

“Water Usage is further clarified and agreed upon between District and Concessionaire as defined in Memorandum of Understanding dated June 18, 2004, a true and correct copy which is attached to this Contract as Exhibit C.”

7. Paragraph 21. Hold Harmless Agreement. This paragraph is deleted in its entirety and replaced with the following:

“Concessionaire shall defend, indemnify and hold harmless the County of San Luis Obispo, the District, the State of California, its officers and employees from any and all claims and demands, costs, expenses, judgments, attorney fees or liabilities that may be asserted by any person or entity that arise out of or in connection with the acts or omissions relating to the performance of any

obligation or duty provided for or relating (directly or indirectly) to this Contract, the tenancy created under this Contract, or the Premises hereunder. The obligation to indemnify shall be effective and shall extend to all such claims and losses, in their entirety, even when such claims or losses arise from the comparative negligence of the County, District, State or its officers and employees. However, this indemnity will not extend to any claims or losses arising out of the sole negligence or willful misconduct of the County, District, State or its officers and employees.

The preceding paragraph applies to any theory of recovery relating to said act or omission by the Concessionaire, or its agents, employees or other independent contractors directly responsible to Concessionaire, including, but not limited to, the following:

- A. Violation of statute, ordinance, or regulation.
- B. Professional malpractice.
- C. Willful, intentional or other wrongful acts, or failures to act.
- D. Negligence or recklessness.
- E. Furnishing of defective or dangerous products.
- F. Premises liability.
- G. Strict liability.
- H. Inverse Condemnation.
- I. Violation of civil rights.
- J. Violation of any federal or state statute, regulation, or ruling

resulting in a determination by the Internal Revenue Service, California Franchise Tax Board or any other California public entity responsible for collecting sales or payroll taxes, when the Permittee is not an independent contractor.

It is the intent of the parties to provide the District, the County of San Luis Obispo, and the State of California the fullest indemnification, defense, and hold harmless rights allowed under the law. If any word(s) contained herein are deemed by a court to be in contravention of applicable law, said word(s) shall be severed from this contract and the remaining language shall be given full force and effect.”

8. Paragraph 22. Insurance is deleted in full and replaced with the following:

“Concessionaire shall obtain and maintain insurance for the entire term of the Contract and Concessionaire shall have no access to the property under this Contract until after it has obtained insurance complying with the provisions of this paragraph, delivered a certified copy of each insurance policy to the District, and obtained District approval of all such policies. Said policies shall be issued by companies authorized to do business in the State of California, or otherwise approved by the County of San Luis Obispo Risk Manager. Concessionaire shall

maintain said insurance in force at all times. The following coverage with the following features shall be provided:

A. Commercial Liability Insurance: Concessionaire shall maintain in full force and effect for the period covered by this Contract, commercial liability insurance. This insurance shall include, but shall not be limited to, comprehensive general and automobile liability insurance providing protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from any act or occurrence arising out of Concessionaire's operations in the performance of this Contract, including, without limitation, acts involving vehicles. The policy shall be in the form of Insurance Services Office (ISO) Form CG 00 01 covering commercial general liability on an "occurrence" basis for bodily injury and property damage, personal injury and advertising injury, with limits no less than \$1,000,000 per occurrence and \$2,000,000 general aggregate limit, with a separate \$2,000,000 excess policy. The following endorsements must be attached to the policy:

- (1) If the insurance policy covers on an "accident" basis, it must be changed to "occurrence".
- (2) The policy must cover personal injury as well as bodily injury.
- (3) Blanket contractual liability must be afforded and the policy must contain a cross liability or severability of interest endorsement.

B. Workers' Compensation Insurance: In accordance with the provisions of sections 3700 of the California Labor Code, et seq., if Concessionaire has any employees, Concessionaire is required to be insured against liability for workers' compensation or to undertake self insurance for the entire term of this Contract.

C. Additional Insureds to be Covered: The professional liability and comprehensive liability policies shall name the "County of San Luis Obispo, the San Luis Obispo County Flood Control and Water Conservation District, and the State of California, its officers and employees" as additional insureds. The policy shall provide that the Concessionaire's insurance will operate as primary insurance and that no other insurance maintained by the District, or additional insureds will be called upon to contribute to a loss hereunder.

D. Certification of Coverage: At Contract Commencement, Concessionaire shall furnish District with the following for each insurance policy required to be maintained by this Contract:

- (1) A copy of the Certificate of Insurance shall be provided. The certificate of insurance must include a certification that the policy will not be canceled or reduced in coverage or changed in any other material aspect without thirty (30) days prior written notice to the County.
- (2) A copy of the Concessionaire's Workers' Compensation policy need not be provided, but a copy of proof of coverage does need to be provided.
- (3) Upon further written request, the Concessionaire shall provide a copy of the entire insurance policy and not just the "face sheet" or proof of coverage.

(4) Approval of Insurance by the District shall not relieve or decrease the extent to which the Concessionaire may be held responsible for payment of damages resulting from Concessionaire's services or operations pursuant to this Contract. Further, the District's act of acceptance of an insurance policy does not waive or relieve Concessionaire's obligations to provide the insurance coverage required by the specific written provisions of this Contract.

E. Effect of Failure or Refusal: If Concessionaire fails or refuses to procure or maintain the insurance required by this Contract, or fails or refuses to furnish the District with the certifications required by subparagraph (D) above, the District shall have the right, at its option, to forthwith terminate the Contract for cause.

Concessionaire shall not do, bring, or keep anything in or about the Premises that will cause a cancellation of any insurance covering the Premises, as set forth above."

/////////////////NOTHING FURTHER EXCEPT SIGNATURES PAST THIS POINT/////////////////

IN WITNESS WHEREOF, District and Concessionaire have executed this Amendment No. 4 to the Contract as of the date last signed below.

DISTRICT:
SAN LUIS OBISPO COUNTY BOARD
OF SUPERVISORS, ACTING IN THE
CAPACITY OF THE BOARD OF THE
SAN LUIS OBISPO COUNTY FLOOD
CONTROL AND WATER
CONSERVATION DISTRICT

By: _____

Chairperson of the Board of Supervisors

Approved by the Board of Supervisors on

_____, 2013

ATTEST:

Clerk of the Board of Supervisors, San Luis
Obispo County Flood Control and Water
Conservation District, State of California

APPROVED AS TO FORM AND LEGAL
EFFECT:

RITA L. NEAL,
County Counsel

BY: Shanna Matamoros

Deputy County Counsel

DATE: 6/18/13

CONCESSIONAIRE : CHRISTOPHER P.
SIMPSON, AN INDIVIDUAL

By: Christopher P. Simpson

Christopher P. Simpson

Date: 6/18/2013

CONCESSIONAIRE: CPS AMUSEMENTS,
INC.

By: Christopher P. Simpson, President

Christopher P. Simpson, President

Date: 6/18/2013

Corporate Certificate

I, Chris Simpson

certify that I am the Secretary of the Corporation
named in the foregoing Amendment No.4; that
Christopher P. Simpson, who signed Amendment
No. 4 on behalf of the corporation, was then
President of said Corporation; and said Amendment
No. 4 was duly signed for and in behalf of said
Corporation by authority of its governing body and is
within the scope of its corporate powers.

By: Chris Simpson

_____, Secretary

(Corporate Seal)

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("Memorandum") is entered into this 18th day of June, 2004, by and between the SAN LUIS OBISPO COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ("District" or "County") and 4 TO GO, INC., a California corporation ("Concessionaire").

RECITALS

WHEREAS, the County and Concessionaire entered into a Contract dated May 21, 1996 and amended June 5, 2001 for the purpose of providing non-exclusive management and concession services at the Lopez Lake Recreation Area; and

WHEREAS, Paragraph 16 of the Contract states "District shall pay all water charges not to exceed 120% of past District costs, in connection with Concessionaire's use of the Premises. The year of 1996 shall be used as a baseline. In the event construction or expansion significantly alters the Concessionaire's water usage, District and Concessionaire may amend this paragraph to reflect such changes"; and

WHEREAS, the water meter for the Premises was inadvertently not read during 1996, thus losing the data to establish the baseline; and

WHEREAS, the meter had been read 1983 through 1994, with an average usage of 4.6 acre feet per year; and

WHEREAS, the meter had been read 1997 through 2003, with an average usage of 8.4 acre feet following Concessionaire's expansion of the facilities; and

WHEREAS, Concessionaire acknowledges that charges for water exceeding 120% of the baseline would have been payable to the District, but such charges are unable to be calculated; and

WHEREAS, District's cost of supplying water to the Lopez Lake Recreation Area was \$1,960 per acre foot during Fiscal Year 2002-03; and

WHEREAS, the District's cost of supplying water to the Lopez Lake Recreation Area is difficult to forecast; and

WHEREAS, the purpose of the Memorandum is to clarify a baseline for water usage and to establish how future water usage will be calculated;

NOW, THEREFORE, the DISTRICT and CONCESSIONAIRE memorialize their understandings as follows:

EXHIBIT C

AGREEMENT

1. Baseline: The 1996 baseline for the purposes of this Contract shall be 4.6 acre feet.
2. Water Usage: Concessionaire shall be entitled to use 5.5 acre feet (120% of 4.6 acre feet) before incurring water charges for District's cost of water.
3. Water Measurement: Water usage will be determined by reading the water meter on or about January 1st each year. Water usage exceeding 5.5 acre feet shall be paid by Concessionaire to County within 30 days of receipt of notice.
4. Water Cost 2004: Water cost for 2004 shall be based on District's costs for Fiscal Year 2003-04, which is \$1,960 per acre foot.
5. Future Water Cost: At District's option, District's actual water cost may be calculated following the end of each fiscal year for the period of July 1st through June 30th and may be used to determine cost of water usage over baseline for the following calendar year. In lieu of calculating the District's actual cost to provide water each year, however, District may elect to determine water cost per acre-foot based on a CPI increase from the prior year's rate. Beginning January 1, 2005, and every subsequent annual anniversary date thereafter, the preceding year's water cost shall be adjusted upward according to either the percentage rise in the Consumer Price Index (CPI) or the District's actual cost of water. The adjustment shall be by a percentage equal to the percentage increase of the Consumer Price Index between the July published CPI and the corresponding CPI for the same period twelve months previous. If there is a decrease or no change in the CPI, then the preceding year's water cost per acre-foot will not be adjusted.

County will provide written notice to Concessionaire of adjusted water cost on an annual basis. The term "Consumer Price Index" refers to the Consumer Price Index for Urban Wage Earners and Clerical Workers, Los Angeles - Riverside-Orange County Statistical Area, California, based on the period of 1982-84 = 100 as published by the Bureau of Labor Statistics of the U.S. Department of Labor.

The index for the adjustment date shall be the one reported in the U.S. Department of Labor's most comprehensive official index then in use and most nearly answering the foregoing description of the index to be used. If it is calculated from a base other than the base period (1982-84=100), the base figure used for calculating the adjustment percentage shall first be converted under a formula supplied by the Bureau.

If the described index is no longer published, another generally recognized as authoritative shall be substituted by agreement of County and Concessionaire. If County and Concessionaire are unable to agree within 30 days after demand by either party, on application of either party the substitute index shall be selected by the chief officer of the San Francisco regional office of the Bureau of Labor Statistics or its successor.
6. Concessionaire agrees to resurface with Guard Top and to re stripe the parking lot across from the Mustang Watershutes as identified in Exhibit A" to specifications acceptable to County.

7. In consideration of the terms of this Memorandum of Understanding, District agrees to waive the collection of water overage fees due from Concessionaire through December 31, 2003.
8. Notices. Any notices to be delivered on matters pertaining to this Memorandum shall be addressed as follows:

If to County of San Luis Obispo:

Department of General Services
1087 Santa Rosa Street
San Luis Obispo, CA 93408
Attn: Caryn Maddalena, Property Manager

If to Concessionaire:

Mustang Waterslides
P. O. Box 7109
Los Osos, CA 93412
Attn: Philip O'Carroll

9. Entire Agreement. This Memorandum contains all representations and the entire understanding and agreement between the parties on this matter. In no event shall this Memorandum be altered or modified except by writing, signed by all parties hereto, specifically stating that it is intended to alter or modify the terms and conditions of this Memorandum.

IN WITNESS WHEREOF, the parties hereto have executed this Memorandum of Understanding as of the date first referenced above.

COUNTY OF SAN LUIS OBISPO,
ON BEHALF OF THE SAN LUIS OBISPO
COUNTY FLOOD CONTROL AND
WATER CONSERVATION DISTRICT

4 TO GO, INC., A CALIFORNIA
CORPORATION

BY: 
Duane Leib
General Services Director

BY: 
Philip S. O'Carroll

APPROVED AS TO FORM AND LEGAL EFFECT:
JAMES B. LINDHOLM, JR.
County Counsel

By: 
Deputy County Counsel

Date: 6/18/04

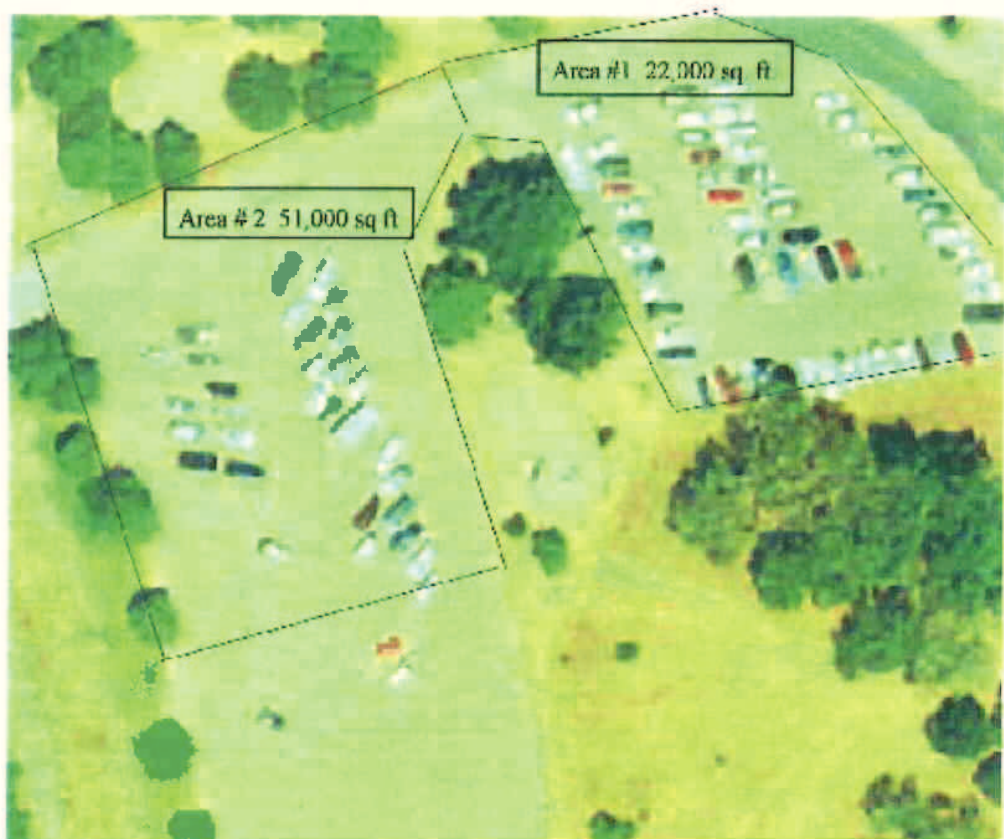


Figure 1 Outlined indicates area of proposed Guard Top resurfacing, and parking lot striping.

Exhibit "A"

2007-05-01 10:00 AM

2007-05-01 10:00 AM